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Liability Methodology

Enforcement Policy Background

In 2017, the State Water Resources Control Board adopted updates to the [Water Quality Enforcement Policy](#)¹ with the goal to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most fair, efficient, effective, and consistent manner. According to the Enforcement Policy, enforcement is a critical component in creating the deterrence needed to encourage the regulated community to anticipate, identify, and correct violations. Formal enforcement should always result when a non-compliant member of the regulated public begins to realize a competitive economic advantage over compliant members of the regulated public. Formal enforcement should be used as a tool to maintain a level playing field for those who comply with their regulatory obligations by setting appropriate civil liabilities for those who do not.

California Water Code (Water Code) section 13385 requires the San Diego Water Board to consider several factors in determining administrative civil liability, such as the potential for harm to the environment, and a violator's culpability and ability to pay. The Enforcement Policy incorporates these factors in a methodology for determining administrative civil liability in instances of noncompliance. Each factor of the Enforcement Policy's ten-step approach (Page 9 of the Policy) is evaluated in context of the specific allegation and is described below.

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https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf

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Description of Violation

Water Code section 13376 requires that a person who discharges, or proposes to discharge, pollutants to the navigable waters of the United States within the jurisdiction of California shall file a report of the discharge in compliance with the procedures set forth in Water Code section 13260. Water Code section 13260 requires a report of waste discharge be submitted to the San Diego Water Board when any person discharges waste, or proposes to discharge waste, that could affect the quality of waters of the State in the San Diego Region. Discharges from construction sites greater than or equal to one acre must meet this requirement by timely enrolling in California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, NPDES No. CAS000002, as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction and Land Disturbance Activities* (CGP). To enroll in the CGP, the Legally Responsible Person must electronically submit Permit Registration Documents (PRDs) including a Notice of Intent, Risk Assessment, Site Map, Storm Water Pollution Prevention Plan (SWPPP), Annual Fee, and Signed Certification Statement to the Stormwater Multiple Application and Report Tracking System (SMARTs) database prior to the commencement of construction activities. This requirement is described in Provision II.B. of the CGP.

In a letter dated May 3, 2021, to the State Water Board, the Santa Margarita Water District (Discharger) explained that it had inadvertently failed to submit the PRDs into SMARTs for its Aufdenkamp Connection Transmission Main Relocation Construction Project (Project) prior to the start of construction activities. Although it failed to timely obtain regulatory coverage, the Discharger stated that it prepared the PRDs. Most notably, it developed and implemented a SWPPP for the Project and took necessary action to protect water quality as required by the CGP. The Project began on July 1, 2020, and is now complete. The Discharger submitted the PRDs on May 7, 2021, resulting in 311 days of non-compliance.

The Prosecution Team alleges that the Discharger violated Water Code section 13376 for 311 days by failing to timely obtain regulatory coverage for the Project. The alleged violation is subject to a maximum administrative civil liability of \$10,000 per day of violation under Water Code section 13385(c).

Ten-Step Penalty Calculation Methodology (Page 9 of the Policy)

Step 1. Actual Harm or Potential for Harm for Discharge Violations

This step is not applicable.

Step 2. Assessment for Discharge Violations

This step is not applicable.

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Step 3. Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation considering two factors: the potential for harm and the extent of deviation from the applicable requirements.

Potential for Harm: Moderate

The Enforcement Policy requires a determination of whether the characteristics of the violation resulted in a minor, moderate, or major potential for harm or threat to beneficial uses. A "moderate" potential for harm is appropriate when the characteristics of the violation have substantially impaired the San Diego Water Board's ability to perform their statutory or regulatory functions, present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.

The characteristics of this violation substantially impaired the San Diego Water Board's ability to perform their statutory and regulatory functions because staff was unaware of this construction project taking place, and therefore was unable to review compliance documents related to this project, or plan field inspections.

Further, the Project is located approximately 0.4 miles upstream of Aliso Creek in the San Juan Hydrologic Unit. Aliso Creek supports the following Beneficial Uses: Agricultural Supply (AGR); Contact Water Recreation (REC-1); Non-Contact Water Recreation (REC-2); Warm Freshwater Habitat (WARM); and Wildlife habitat (WILD). Aliso Creek is listed on the 2014-2016 Clean Water Act Section 303(d) List of Water Quality Segments as impaired for the following pollutants/conditions: phosphorus, nitrogen, selenium, toxicity, indicator bacteria, benthic community effects, and malathion. Stormwater discharges from construction sites can contain some of these pollutants or may exacerbate some of these impairments. A “moderate” potential for harm is appropriate for this violation.

Deviation from Requirement: Moderate

The Enforcement Policy requires a determination of whether the violation represents a minor, moderate, or major deviation from the applicable requirements. A "moderate" deviation from requirement is appropriate when the intended effectiveness of the requirement was partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement was only partially achieved).

The Prosecution Team assigned a value of “moderate” for this penalty factor because the intended effectiveness of the requirement was partially compromised. Although the Discharger failed to timely submit the PRDs, it did prepare them, according to the Discharger's letter dated May 3, 2021. The Discharger stated that it developed and implemented a Stormwater Pollution Prevention Plan (SWPPP) and implemented best management practices during the life of the project. Assuming the Discharger was in compliance with the CGP requirements as stated in its' letter, these actions preserved the intended effectiveness of the requirement, which is to prevent or minimize discharges of pollutants and protect water quality downstream of construction activities. However, the intended effect of regulatory oversight was compromised because staff

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was not aware of the Project, as discussed above. A “moderate” deviation from requirement is appropriate.

Per Day Factor for Non-Discharge Violations = 0.35

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.3 to 0.4 for non-discharge violations with a moderate potential for harm and moderate deviation from requirement. The Prosecution Team used the midpoint of the range, or 0.35.

Days of Violation = 311

According to the Notice of Intent (NOI), construction began on the Project on July 20, 2020, and the Discharger obtained regulatory coverage for the Project on May 7, 2021, amounting to 311 days of violation.

Multiple Day Violations = 44

For violations that do not cause daily detrimental impacts to the environment or the regulatory program, the Enforcement Policy allows for an adjustment in days of violation when liability is assessed on a per-day basis and the violation lasts longer than 30 days.

In a letter dated May 3, 2021, the Discharger explained that the violation occurred without its knowledge, therefore, it did not take action to eliminate the violation sooner. As such, collapsing days as allowed by the Enforcement Policy is appropriate.

Collapsing days per the Enforcement Policy² =

1-30, 35, 40, 45, 50, 55, 60, 90, 120, 150, 180, 210, 240, 270, 300 = 44 days of non-compliance.

Initial Liability Amount = \$110,000

The initial liability amount for the violation calculated on a per-day basis is:

[\$10,000 (per day statutory maximum) x 0.35 (factor) x 44 (days of violation)] =
\$154,000

Step 4. Adjustment Factors

The San Diego Water Board must consider three additional factors for potential modification of the administrative civil liability amount: the violator’s degree of culpability, the violator’s prior violation history, and the violator’s voluntary efforts to cleanup, or its cooperation with regulatory authorities after the violation.

Degree of Culpability = 1.1

Higher penalties should result from intentional or negligent violations as opposed to accidental violations. The Enforcement Policy allows a multiplier between 0.75 and 1.5

² The Enforcement Policy states that when collapsing days, the liability shall not be less than an amount calculated based on an assessment of the initial Total Base Liability Amount for the first 30 days of the violation, plus an assessment for each 5-day period of violation, until the 60th day, plus an assessment for each 30 days of violation thereafter.

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to be used, with a higher multiplier for intentional or negligent behavior, and a lower multiplier for accidental or non-negligence behavior.

The Discharger is a water district with years of experience related to the CGP and related regulatory requirements. According to the Discharger, it prepared the SWPPP and other PRDs but ultimately failed to complete the final step, which was to submit the information to SMARTs and obtain a Waste Discharge Identification Number. Failure to complete the final step was due to simple negligence.

History of Violations = 1.0

The Discharger has no prior history of similar violations for failing to obtain CGP coverage prior to commencing construction.

Cleanup and Cooperation = 1.0

Days after the Discharger discovered that it had inadvertently failed to upload the PRDs into SMARTs, it did so retroactively and provided the State Water Resources Control Board with an explanation for the delay. This is consistent with conduct expected from a reasonable and prudent person/Discharger.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability Amount is determined by multiplying the initial liability by the Adjustment Factors in Step 4:

Total Base Liability Amount = [\$154,000 (initial liability amount) x 1.1 (degree of culpability) x 1.0 (history of violations) x 1.0 (cleanup and cooperation)] = **\$169,400.**

Step 6. Ability to Pay and Ability to Continue in Business

The Enforcement Policy allows for an adjustment to a proposed liability after an analysis of a violator's ability to pay a proposed penalty and continue in business. This is determined by looking at the violator's income and net worth. The Santa Margarita Water District is a public agency and had an operating budget of \$73.2 million for fiscal year 2021³; therefore, available evidence indicates that the Discharger has the ability to pay this liability and continue in business.

Step 7. Economic Benefit

The economic benefit is any savings or monetary gains from noncompliance. The Discharger gained an economic benefit from not paying a Legally Responsible Person to submit all Permit Registration Documents (PRDs) in SMARTs before the commencement of construction. According to the Discharger's letter dated May 3, 2021, the PRDs were prepared and adhered to throughout the life of the project and submitted on May 7, 2021.

Assuming a billing rate of \$200/hour for a Chief Engineer, and assuming it takes 1 hour to log into SMARTs and upload the PRDs, the Discharger experienced an economic benefit of \$3 in delayed costs for failing to timely submit and certify the PRDs.

³ <https://www.smwd.com/DocumentCenter/View/2890/20202021-Fiscal-Year-Budget>

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The Discharger paid \$509 in CGP filing fees upon submitting the PRDs on May 7, 2021. However, it experienced an economic benefit of \$441 by not timely paying the \$509 filing fees for a 2.2-acre construction site (see Exhibit 2 for USEPA BEN model calculations).

The total economic benefit was **\$444**.

Step 8. Other Factors as Justice May Require

The Enforcement Policy allows an adjustment to the administrative civil liability if the San Diego Water Board believes that the amount determined using the above factors is inappropriate. In this matter, the misconduct is failing to file for regulatory coverage on time. Mitigating factors to support lowering the Total Base Liability Amount include the Discharger reported that it complied with the CGP during the 311 days of failing to file, including developing and implementing a SWPPP. Within days of discovering the administrative error of not filing the PRDs, the Discharger on its own volition contacted the State Water Board to explain why it was uploading PRDs for a construction project that had already been in construction for months.

Since the CGP is an NPDES permit under the federal Clean Water Act (33 U.S.C. 1251 et seq.) it is enforced under California Water Code section 13385 which has a maximum administrative liability of \$10,000 a day (See Step 9, below). Many (if not all) state-led regulatory programs administered by the San Diego Water Board are enforced under California Water Code section 13261 with an amount of liability not to exceed \$1,000 for each day of violation. In this case, the Total Base Liability Amount proposed using \$10,000 a day is \$169,400. Using \$1,000 a day instead for the Total Base Liability Amount results in proposing \$16,940 (Initial Liability Amount is \$15,400), significantly less than \$169,400. Had this conduct of failing to file for regulatory coverage on time occurred in a different program, the proposed liability would be \$16,940. Therefore, the Prosecution Team proposes assessing \$16,940 in liability is reasonable considering these mitigating factors.

The Prosecution Team is not adding the costs of investigating and enforcing this matter, and contends that \$16,940 is fair, ensures that no competitive economic advantage was attained by non-compliance, and deters future violations by both the Discharger and the regulated community.

Step 9. Maximum and Minimum Liability Amounts

Water Code section 13385(c) states that the maximum administrative civil liability for a violation of Water Code section 13376 is \$10,000 per day. The Enforcement Policy states that the minimum liability should be at least ten percent higher than the economic benefit amount.

Statutory maximum liability = (311 days x \$10,000 per day) = **\$3,110,000**

Minimum Liability = [\$444 + (\$444 X 10%)] = **\$488**

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Step 10. Final Liability Amount

The Final Liability Amount = **\$16,940**

The Final Liability Amount is less than the statutory maximum liability and more than the minimum liability.